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IN THE

Supreme Court of the United States

October Term, 1964.

No. [redacted] ,21

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, AND PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS AND LOYD B. SANDS, AND THE SUPERIOR OIL COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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No. .

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, AND PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS AND LOYD B. SANDS, AND THE SUPERIOR OIL COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners, The United Gas Improvement Company, Long Island Lighting Company and Philadelphia Electric Company, pray that a Writ of Certiorari issue to review the judgment entered by the United States Court of Appeals for the Fifth Circuit on August 14, 1954, which reversed certain orders of the Federal Power Commission.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit is reported at 335 F. 2d 1004. It is reprinted as Appendix B hereto, *infra* pp. 11a-37a. The opinions of the Federal Power Commission are reported at 30 FPC 283 and 30 FPC 682 (1963), and are reprinted in the Joint Appendix filed in the Court of Appeals, copies of which have been deposited with this Court by the Solicitor General of the United States (R. 550-93, 607-17). The Examiner's decision, adopted in substantial part by the Commission, is reported at 30 FPC 304 (1963), and is also reprinted in the deposited Joint Appendix. (R. 491-541).

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 14, 1964, *infra* p. 40a. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b).

QUESTIONS PRESENTED.

This Court held in *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 578 (*Catco*), that the Federal Power Commission erred on the record before it by issuing, under § 7 of the Natural Gas Act, unconditioned permanent certificates to independent producers of natural gas to make initial sales in interstate commerce from South Louisiana at the initial price of 22.4¢ per Mcf (including tax reimbursement). This Court there said that the producers' applications signalled the presence of a situation probably not in the public interest, and pointed out that such situations exist whenever an initial price—such as 22.4¢ per Mcf in South Louisiana—is "out of line" or "might result in a triggering of general price rises." When such a situation appears, this Court stated, the Commission must either deny the certificate altogether or attach such conditions as the public interest requires.

In the present case the Commission found as a fact that (1) prices during the relevant period in South Louisiana above 18.5¢ per Mcf (plus 1½ cents tax reimbursement) would be "out of line," and (2) any subsequent increase of the applicants' prices under § 4(e) above 23.55¢ per Mcf (including applicable tax) would trigger a general price rise in the area due to favored-nation or price redetermination clauses in other contracts. The Commission found no need to hear cost-of-service and other rate evidence, since (1) such evidence would have transformed the § 7 proceeding into a full-blown rate case, and (2) such evidence, in its expert judgment, gained from prior § 7 proceedings, was of no use in determining a proper initial price in conformity with this Court's *Catco* decision. Consequently, the Commission held it would issue permanent certificates to producer-respondents herein only upon the condition that they (1) reduce their initial prices to 18.5¢ per Mcf, plus tax; (2) not file for increases under § 4(e) of the Act above 23.55¢ per Mcf until July 1, 1967, or the

conclusion of the South Louisiana area rate proceeding, whichever was earlier; and (3) refund excesses collected pursuant to improperly issued certificates above 18.5¢ per Mcf, plus tax. The Court of Appeals reversed. It held the Commission erred in failing to listen to extensive cost and other rate case evidence, and in requiring a limited moratorium; it affirmed the Commission's power to order refunds, but found error in the Commission's standard for computing them. The questions presented, therefore, are:

1. In a proceeding to determine the initial price required by the public convenience and necessity under § 7, is the Commission required to receive all cost and trend evidence (including the type relevant to determine just and reasonable rates under § 4 or § 5 and concurrently being heard in the South Louisiana Area Rate Proceeding, Docket AR61-2), particularly where the Commission has determined in previous § 7 proceedings that such evidence is useless in determining the § 7 issues outlined by this Court in *Catco*?

2. Does § 7 permit the Commission to issue a permanent certificate upon the condition that the applicant sell at an initial price no higher than the "in line" price for the area?

3. Does § 7 permit the Commission to issue a permanent certificate upon the condition that an applicant not thereafter file for rate increases under § 4(e) above a level that would trigger a general price rise, until the Commission has time to complete the determination of just and reasonable rates for the area in an area rate proceeding being concurrently conducted?

4. Does § 7 permit the Commission to issue a permanent certificate upon the condition that an applicant refund all sums collected pursuant to improperly issued certificates above the proper public convenience and necessity initial price during the pendency of the determination of such price?

STATUTE INVOLVED.

The statutory provisions involved are §§ 4, 5, 7, and 19(b) of the Natural Gas Act, 52 Stat. 821 (1938), *as amended*, 15 U. S. C. §§ 717c, 717d, 717f and 717r(b). These Sections are printed in Appendix A, *infra*, pp. 1a-8a.

STATEMENT OF THE CASE.

As the Court of Appeals for the Fifth Circuit stated in its opinion below reversing the Federal Power Commission, these cases "present important questions under the Natural Gas Act, 15 USCA § 717. These include the nature of the hearing and the scope of the pertinent evidence bearing on price in a § 7 application for permanent certificate, the legality of retroactive rate refund, and the validity of a moratorium on post-certificate § 4 price increases" (Appendix B, *infra*, p. 11a).

The relevant facts are: Callery Properties, Inc. and the other 7 natural gas producer-respondents here entered into contracts with various interstate pipelines, including Transcontinental Gas Pipe Line Company, in 1957 and 1958 to sell gas from South Louisiana for resale by the pipelines in interstate commerce. The initial prices proposed ranged from 21.4¢ per Mcf (excluding tax reimbursement) to 23.8¢ per Mcf (including tax reimbursement). The contracts also provided for increased prices at periodic intervals, the increases ranging above 23.55¢ per Mcf. In a series of orders issued in 1958 and 1959, the Commission, over consumer opposition, granted unconditioned permanent certificates of public convenience and necessity authorizing such sales at the prices requested.[1] The producer-respondents accepted these certificates and began sales within a short time after their issuance even though the certificates were still subject to pending petitions for Commission rehearing and court review.

1. These various orders dealt with a total of 69 applications by various producers. After remand of these orders by the courts, the bulk of the applications were settled in accordance with terms approved by the Commission, 28 FPC 247 (1962).

The issuance of such unconditioned permanent certificates was contested by consumer representatives, including The United Gas Improvement Company and The Public Service Commission of New York, who maintained that the contract prices were excessive and that, therefore, the sales at the certificated prices would not be in the public interest. Consumer representatives sought judicial review of the Commission orders granting unconditional certificates in five United States Courts of Appeals. The Third Circuit sustained the Commission's action, *The United Gas Improvement Co. v. FPC*, 269 F. 2d 865 (3rd Cir. 1959), but this Court in December of 1959 summarily reversed that decision[2] and ordered the case remanded to the Commission for reconsideration and redetermination in the light of *Atlantic Refining Co. v. Public Service Comm'n*, 360 U. S. 378 (*Catco*). *Catco* stated that in a § 7 proceeding the Commission should not issue a permanent certificate permitting the sale of gas in interstate commerce where (1) the initial price was out of line, or (2) the contract price would cause triggering of general price rises in the area due to favored nation or price redetermination clauses in existing contracts with the same or other pipelines in the area.

After the summary reversal of the Third Circuit by this Court, the Ninth, District of Columbia, Tenth and Fifth (two cases) Circuits reversed similar Commission orders and remanded the proceedings to the Commission.[3]

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2. *Public Service Comm'n v. FPC*, 361 U. S. 195 (Texaco-Seaboard).

3. The original Commission opinions, and the court reversals are as follows (producer-respondents here shown in parentheses):

(1) *Transcontinental Gas Pipe Line Co.*, Op. 315, 20 FPC 264 (1958), *aff'd sub nom., United Gas Improvement Co. v. FPC*, 269 F. 2d 865 (3rd Cir. 1959) *reversed mem. sub nom., Public Service Comm'n v. FPC*, 361 U. S. 195 (Placid, Hill, Frankel).

(2) *Texas Gas Transmission Corp., Op.* 327, 22 FPC 378 (1959), *reversed, Public Service Comm'n v. FPC*, 287 F. 2d 146 (D. C. Cir. 1960), *cert. denied*, 365 U. S. 880 (Callery, Sands, McDermott, Ocean Drilling).

Finally, some four years after the original § 7 hearings, the Commission on March 7, 1962 set the remanded cases down for a new consolidated hearing, which was held on June 18-21, 1962.

The producers' evidence showed that

> ". . . there were 47 contracts executed in 1957 with volumes of 56,500 Mmcf and 59 contracts executed in 1958 with volumes of 70,500 Mmcf at initial prices of 18.5 cents or less. Also, out of a total of 1958 deliveries of 241,200 Mmcf from Southern Louisiana under contracts made prior to the initial erroneous CATCO order, only 63,900 Mmcf was sold at price above 18 cents." (R. 558)(footnote omitted)

The Examiner so found (R. 506-07) and the producers do not challenge the finding.

The Commission also noticed and found that if the producers were permitted to file for contractual increases above 23.55¢ per Mcf, rates of other producers in South Louisiana would be triggered upward (R. 577). This finding was not upset by the Court of Appeals. Appendix B, *infra*, p. 26a, n. 34.

The controversy here arises essentially because at the outset of the hearing the producer-respondents sought to offer in evidence a "tremendous mass of cost-type, economic and financial evidence—consisting of approximately 70 exhibits and the testimony of 35 witnesses" (R. 495; see Appendix B, *infra*, p. 14a).

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(3) *California Co.*, 22 FPC 252 (1959), *reversed, United Gas Improvement Co. v. FPC*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U. S. 879 (Superior).

(4) *Sun Oil Co.*, 22 FPC 351 (1959), *reversed, United Gas Improvement Co. v. FPC*, 290 F. 2d 133 (5th Cir. 1961), *cert. denied*, 368 U. S. 823 (no present respondent).

(5) *Sunray Mid-Continent Oil Co.*, 22 FPC 361 (1959), *reversed, United Gas Improvement Co. v. FPC*, 287 F. 2d 159 (10th Cir. 1961) (no present respondent).

(6) *Superior Oil Co.*, 22 FPC 369 (1959), *reversed, United Gas Improvement Co. v. FPC*, 290 F. 2d 147 (5th Cir. 1961), *cert. denied*, 366 U. S. 964 (Superior).

In an important earlier cognate case, *Skelly Oil Co.*, Opinion No. 362, 28 F. P. C. 401 (1962), the Commission had considered evidence of the same type and concluded "in strong and unequivocal terms, that economic and financial evidence is generally not to be regarded as germane in resolving the initial price question in producer certificate cases" (R. 497). This decision of the Commission was affirmed by the Court of Appeals for the District of Columbia in *Public Service Comm'n v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied*, 377 U. S. 963.

In the present case the Commission adopted the Examiner's conclusion that the offered evidence:

> ". . . may be characterized roughly as falling generally into three basic categories, as follows:
>
> "1) *Cost of service studies* of various types. It may be noted that substantial portions of this evidence were defective in that they employed methods and techniques inconsistent with those previously adopted by the Commission in *Phillips*, Op. No. 338, and CATCO, Op. No. 351.
>
> "2) A number of *discounted cash flow studies*, similar to the one rejected by the Commission in CATCO, Op. No. 351.
>
> "3) *Economic trend data studies* of various types, setting forth data related to drilling trends and costs, data related to supply, demand, revenues and profits, and market trend data.
>
> "Certain of these studies were identical in nature with similar studies which the Commission in the El Paso certificate case, El Paso Natural Gas Co., et al., Op. No. 358 (June 11, 1962), found to have 'no real probative value.'" (R. 556, 495) (footnote omitted)

The Examiner refused to accept such evidence, and was sustained in this ruling by the Commission. The Commis-

sion rested its refusal to consider such evidence upon the following ground:

> "If this mountain of cost-type, economic and financial evidence had been received in the instant proceeding the instant hearing would, in effect, have amounted to the trial of some 16 different individual producer cost-type cases, and the decisional process required would have involved, in effect, the writing of some 16 different individual producer rate decisions. Any such proceeding would plainly have amounted to an administrative monstrosity. It would obviously have been completely contrary to the objectives emphasized in the Commission's instant order of March 7, 1962, i.e., to obtain a prompt determination of the initial price question (and of the refund obligations of the producer applicants), by a limited proceeding on the basis of the 'ground rules' already established by the Commission in CATCO, Op. No. 351. In addition, any such procedure would have been completely inconsistent with the Commission's clearly expressed policy determination that producers rates are hereafter to be tried and decided on an area basis, rather than on an individual producer cost basis." (R. 556, 496) (footnote omitted)

Having resolved the cost evidence issue, the Examiner proceeded to find that the going price for substantial sales volumes of gas under contemporarily executed contracts in South Louisiana was 18.5¢ per Mcf, plus 1.5¢ reimbursement for the state severance tax, where applicable. He conditioned permanent certificates to this level and ordered refunds, with interest, of all amounts theretofore collected under improperly issued certificates in excess of the in-line price so determined. On July 17, 1963, some five years after the original hearings, the Commission issued its Opinion 398 affirming the Examiner in all respects. In addition, the Commission, based upon its finding that any

price above 23.55¢ would trigger general price rises under other contracts in the area, ordered a limited moratorium on all price increases in excess of 23.55¢ per Mcf (including tax reimbursement) until the final decision of the area rate proceeding for South Louisiana, Docket AR61-2, which is to fix the just and reasonable price for gas in the area, or until July 1, 1967, whichever is earlier.

Callery Properties, Inc. and the seven other producer-respondents here, took an appeal to the Court of Appeals for the Fifth Circuit. The United Gas Improvement Company, Long Island Lighting Company and Philadelphia Electric Company,[4] Petitioners here, were permitted to intervene. That court on August 14, 1964, reversed the Commission. It held that the Commission erred in excluding the cost-type evidence. Despite the Commission's clear holding that such evidence would cause § 7 proceedings to bog down and become full dress § 4 or 5 rate hearings and, based upon experience in previous cases where such evidence was admitted, was not useful, in any event, in determining the public-convenience-and-necessity initial price in § 7 proceedings, the court below nevertheless held that such extensive evidence would have to be accepted. In so ruling, the court made no reference to the crucial fact that this Court had held, *Wisconsin v. FPC*, 373 U. S. 294, that the

4. Under an agreement with the City of Philadelphia, The United Gas Improvement Company operates the municipally-owned Philadelphia Gas Works and related facilities, distributing 1035 Btu natural gas to some 600,000 customers in the City of Philadelphia. It also distributes gas to some 205,000 customers in other parts of Pennsylvania. Long Island Lighting Company, a utility organized under the Transportation Corporation Law of the State of New York, distributes natural gas to some 357,000 customers in an area of 1,230 square miles on Long Island, New York. Philadelphia Electric Company is a public utility organized under the laws of the Commonwealth of Pennsylvania. It distributes natural gas to some 240,000 customers in Delaware, Chester, Montgomery, Bucks and Lancaster Counties, Pennsylvania. All three distributors purchase substantial quantities of natural gas for resale from Transcontinental Gas Pipe Line Company and other pipelines which in turn purchase substantial quantities of gas from producers in South Louisiana.

Commission need not proceed in *rate* cases on the basis of *individual company costs,* or the fact that other cost and trend evidence was at the time of decision being heard in a lengthy area rate proceeding (Docket AR61-2) involving the very area—South Louisiana— and covering the very producers in the present case. The court further held that the Commission had no power by condition to impose a limited moratorium on the producers' exercise of their contract right to file rate increases above 23.55¢ until July 1, 1967, or the conclusion of AR61-2 (in which Staff and intervenor evidence supports a just and reasonable rate well *below* the in-line level found by the Commission in the present proceeding). This holding overrode the Commission finding that any filing above 23.55¢ would trigger rate increases under other contracts. Finally, the court held that the Commission had the power to order refunds, but that the refunds could not be ordered down to the appropriate initial price level. Rather, it geared refunds to an as yet undertermined just and reasonable level, in the unlikely event that that level should turn out to be higher than the initial price level.

Petitioners now seek review of this decision by this Court. As pointed out *infra,* the decision by the Court of Appeals for the Fifth Circuit has caused great confusion in § 7 proceedings. Producers now contend that the decision compels the Commission in other § 7 proceedings to accept cost-of-service evidence wholesale and regardless, while consumers interests and the Commission have contended that such evidence is still useless, fatal to effective regulation and not required. The correctness of either contention depends upon whether the decision of the Court of Appeals for the District of Columbia in *Skelly,* cited above, is correct, or must bow to the antipodal decision of the court below.

REASONS FOR GRANTING THE WRIT.

1. The Fifth Circuit Decision on Exclusion of Cost-of-Service Evidence and Measure of Refunds Is in Direct Conflict With the Decision of the Court of Appeals for the District of Columbia and Applicable Decisions of This Court; The Fifth Circuit Decision on Limited Moratorium Is Contrary to the Provisions of the Natural Gas Act and Applicable Decisions of This Court.

Section 7 of the Natural Gas Act provides that it is illegal to sell gas in interstate commerce for resale without a permanent certificate[5] from the Commission. The section provides that such certificates are to be granted if and only if such sales are found by the Commission to comport with the public convenience and necessity. Reversing an unconditioned permanent certification there before it, this Court said in *Catco:*

> "Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued.
>
> "There is, of course, available in such a situation, a method by which the applicant and the Commission can arrive at a rate that is in keeping with the public convenience and necessity. The Congress, in § 7(e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require. Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of

5. The statute and regulation provide for the issuance of temporary certificates in an emergency pending the final decision on the producer's application for a permanent certificate. See, *e.g., FPC v. Hunt,* 376 U. S. 515.

general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U. S. at 391.

In discharging its statutory responsibility, as clarified in *Catco*, the Commission, through experience in numerous § 7 proceedings, developed the rule that it would not issue permanent certificates if the initial price sought to be charged exceeded other prices which the evidence of record showed were being concurrently charged in the area in question. The producers, however, have sought since *Catco* to convert initial price hearings under § 7 into full-blown rate cases with all the necessarily attendant delays. Thus an attempt has been made to introduce individual company cost-of-service evidence and other types of evidence which would be introduced if the Commission was to determine whether a rate was just and reasonable, under §§ 4 and 5 of the Act. The Commission has recognized, however, that such evidence would require hearings as long and complex as the hearings which would be required to fix a just and reasonable rate. The Commission also determined, after examining some evidence of this sort in a number of earlier § 7 cases, that such evidence was not "germane in resolving the initial price question in producer certificate cases" (R. 497). Finally, in the *Skelly* case, the Commission concluded:

> "We therefore hold that cost of service and financial requirements evidence normally is not relevant in producer certificate cases and that the initial price in such proceedings shall be determined by the 'in line' price in the area at the time the producer contract in issue was executed and by our guideline ceiling price for the area. We do not mean to foreclose the possibility that a producer may present compelling circumstances in a particular proceeding to justify a higher price, but we wish to emphasize that with the guide-

lines herein established the price issue in certificate cases should be handled expeditiously and that before any evidence which would customarily be presented in establishing a just and reasonable rate can be admitted in evidence, a convincing showing must be made that such evidence is essential to the just disposition of the price question.

"Obviously, we cannot permit every individual certificate case to be converted into a full-blown rate case; the proof in this proceeding demonstrates the lack of utility of a limited cost of service presentation. . . . To correct those defects would require a complete rate case, which we have found not warranted in a certificate proceeding." 28 FPC at 411.

The Court of Appeals for the District of Columbia on January 23, 1964, affirmed the Commission, stating:

"Continental contends that the Commission erred in not considering certain costs and financial requirements, evidence with respect to which was presented to show the amount Continental would be required to receive to recoup its cash outlay with respect to one area of its production here involved, and in failing to consider evidence as to the industry's replacement costs of gas, submitted by Texaco and adopted by the other producers. However, these are not rate cases of the type in which evidence of this kind ordinarily is considered relevant. These proceedings under Section 7, considered with the Catco decision, permit the Commission to fix the 'in-line' price, not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of Catco to avoid the consequences of the well nigh interminable

proceedings incident to a rate case would be defeated. See, for example, United Gas Improvement Co. v. F. P. C., supra, 283 F. 2d at 823. Consideration of the proffered evidence was not essential." 329 F. 2d at 246. (footnote omitted)

The Fifth Circuit below, however, held in direct conflict that consideration of such evidence *was* essential.

The Commission has clearly recognized the conflict between the two Circuits. In its Opinion 436A in *Union Texas Petroleum, et al.*, Docket G-13221, et al., issued October 8, 1964, it said, at mimeo page 3:

> "We are now seeking review of this [*Callery*] decision which is in conflict with the views of other circuit courts as well as this Commission by certiorari to the United States Supreme Court (see *Public Service Commission of New York v. F. P. C.*, 329 F. 2d 242)."

Prior to the instant case all the decisions of the Courts of Appeals on the initial price question have permitted the Commission to base an appropriate initial price in a § 7 proceeding upon an examination of comparable area sales and not of cost or other rate case evidence. *Texaco, Inc. v. FPC*, 290 F. 2d 149 (5th Cir. 1961); *California Oil Co. v. FPC*, 315 F. 2d 652 (10th Cir. 1963); *Atlantic Refining Co. v. FPC*, 316 F. 2d 677 (D. C. Cir. 1963).

In *Phillips Petroleum*, 24 FPC 537 (1960), the Commission found that over-all regulation of producer rates under §§ 4 and 5 was impossible on the basis of individual company costs. This Court affirmed. *Wisconsin v. FPC*, 373 U. S. 294. Yet the court below held that just such individual company costs must be admitted in a hearing under § 7 of the Act. This could only result in a greater "administrative monstrosity" than that described to this Court by the Commission in *Wisconsin v. FPC, supra*, with interminable § 7 cases (oriented to individual company costs) piled on top of existing Sections 4 and 5 area rate

cases. The Natural Gas Act clearly does not contemplate such a procedure. The decision below, far from supporting the "complete bond of protection" for consumers which the Act was passed to effectuate, 360 U. S. at p. 388, heralds destruction of the bond through the sheer weight of administrative delay.

On the issue of a limited moratorium on contractual rate filings above 23.55¢ per Mcf it should be noted that the Commission found that if it were to certificate contracts which permit filings for rate increases above 23.55¢ per Mcf, it would create a situation where other rate filings above 23.55¢ would be triggered in the area due to favored nation or price redetermination clauses in other producer-pipeline contracts. The Court of Appeals for the Fifth Circuit, however, held that the Commission had no power to prevent such triggering. This holding is in direct conflict with this Court's decision in *Catco,* which held that the Commission had the power and, indeed, the obligation to condition the issuance of permanent certificate so as to avoid the effect of triggering. See 360 U. S. at 391. The decision moreover is in conflict with the rationale of this Court's recent decision in *FPC v. Hunt,* 376 U. S. 515, reversing a Fifth Circuit holding that § 7 did not permit the imposition of a moratorium. In that case this Court was dealing with a moratorium on filing for a rate increase as made a condition in a temporary certificate. But as the Fifth Circuit recognized below—yet failed to follow—the language of § 7 makes no distinction between a temporary and a permanent certificate (Appendix B, p. 27a). The rationale of this Court's decision in *Hunt* would apply with even greater force to the issuance of a permanent certificate.

The Fifth Circuit held that the Commission had the power to order refunds of amounts collected under erroneously issued certificates above the public interest initial price. This holding is in accord with the decision of the

Court of Appeals for the District of Columbia in *Skelly, supra,* 329 F. 2d at 249. However, the court below placed the limitation—not raised before the Commission or argued by any of the parties before the court—that refunds of such amounts could be made only down to a floor based upon a finding of the just and reasonable rate for the given sales. This limitation effectively vitiates the court's positive ruling on refunds and again calls for the type of further delays which are so serious in the area of refunds. This limitation imposed *sua sponte* by the court below is in direct conflict with the ruling of the Court of Appeals for the District of Columbia in *Skelly, supra,* 329 F. 2d at 250, that the Commission has power to order refunds of amounts collected pending permanent certification down to the initial price level where the equities permit. The court below disregarded the Commission's findings herein as to the equities (R. 561-62; 514-27), and substituted a procedure of its own devising, geared to a just and reasonable criterion. This procedure is contrary to that uniformly followed by the Commission when it has ordered refunds in cases like the present one, *e.g., Continental Oil Co.,* 27 FPC 96 (1962) (*Catco*-on-remand); *Socony Mobil Oil Co.,* 27 FPC 347 (1962); *cf. Shell Oil Co. v. FPC,* 334 F. 2d 1002, 1008 (3d Cir. 1964). The effect of the court's decision to make justness and reasonableness of rates a criterion in ordering refunds would inevitably be either to turn all certificate proceedings into rate hearings or to defer the ordering of refunds until the conclusion of subsequently instituted rate hearings. Either result would effectively lessen the bond of protection which refunds offer the consumer. *FPC v. Tennessee Gas Transmission Co.,* 371 U. S. 145, 154-55.

2. The Issues Presented Are of Great Public Importance in the Administration and Future Operation of the Natural Gas Act and if Not Resolved Will Cause Confusion in the Discharge of the Commission's Responsibility Under § 7 of the Act.

Since its decision in the *Skelly* case, *supra*, the Commission has determined that in a § 7 proceeding it will not permit the introduction of cost-of-service evidence; that where refunds are appropriate it would order refunds down to the initial price; and that it would impose a moratorium on filings above 23.55¢ per Mcf because of the triggering effect, until it had disposed of the Area Rate proceeding in South Louisiana, or July 1, 1967, whichever is earlier. This procedure was adopted to hold the line until the Commission can complete the Area Rate proceedings adopted as the technique to regulate producer prices. This Court has given tentative approval to such an approach. *Wisconsin v. FPC*, 373 U. S. 294. The decision of which review is here sought holds that in each one of its particulars the Commission's procedure was in error. Such a decision makes a shambles and a nullity of the Commission's painstakingly worked out regulatory program to hold the initial price line until completion of its area rate proceedings.

As this Court knows, review of a Commission order can always be taken to the District of Columbia Circuit. 15 U. S. C. § 717r(b). In addition, review can be had in any other Circuit in which one or more of the parties is located, *ibid.* Thus the Commission has no way of anticipating whether a given decision will be reviewed by the District of Columbia Circuit or another Circuit, such as the Fifth Circuit. The District of Columbia Circuit has told the Commission that its procedure is correct; the Fifth Circuit has told the Commission the opposite. In cases presently being heard before the Commission producers have attempted to introduce cost-of-service evi-

dence, relying upon the decision below, but the Commission has taken a firm position that until the conflict is resolved by this Court, it will continue to follow the practice approved by the contrary ruling of the District of Columbia Circuit, which this Court refused to review. 329 F. 2d 242, *cert. denied*, 377 U. S. 963.

There are now pending before the courts or in hearing before the Commission the following proceedings in which the issue of the introduction of cost-of-service evidence is in contest as the result of application of the Commission's procedure: *Amerada Petroleum, et al.*, Docket CI62-1544, *et al.* (Texas); *Union Texas Petroleum Corp., et al.*, Docket G-13221, *et al.* (So. La.); *Sun Oil Co., et al.*, Docket G-8592, *et al.* (Miss.); *H. L. Hawkins & H. L. Hawkins, Jr., et al.*, Docket G-18077, *et al.* (Texas); *Sinclair Oil & Gas Co., et al., Docket* G-16760, *et al.* (Texas); *Turnbull & Zoch Drilling Co., et al.*, Docket G-17960, *et al.* (Texas). In each case the Examiner has refused cost-of-service and similar evidence. Each case will have to be retried if appeal to the Fifth Circuit results in reversal. Such a reversal would entail holding individual "rate-type" proceedings for each and any of the some hundred and fifty producers involved in these various proceedings should they choose to introduce extensive cost evidence. In contrast, if appeal is to the District of Columbia Circuit, the Commission would be sustained on these issues. Such a situation necessarily creates confusion and chaos in the administrative process.

It is equally of public importance to determine the power of the Commission to require a moratorium pending the outcome of the area rate proceeding in South Louisiana. If the decision below stands, the Commission could find itself required to conduct hundreds of §§ 4(e) and 5(a) proceedings, resulting from triggered rate increases, simultaneously with the "rate-type" § 7 proceeding contemplated by the court's decision below and with the numerous area

rate proceedings now planned, four of which (dealing with the major gas areas) are in some stage of hearing.

Finally, it is in the public interest to determine the proper measure of the refunds since the Commission previously has uniformly followed the practice that refunds should be made down to the initial price ultimately found, rather than to a just and reasonable level.[6] If the floor is the just and reasonable price, it would mean once again that the Commission would necessarily find itself involved in lengthy § 4(e) and § 5(a) hearings to determine such price. The other alternative would be that the issue of the amount of refunds would have to remain in suspension until after the Area Rate proceedings are concluded, a procedure which substantially vitiates the protection they are supposed to offer the ultimate consumer. *FPC v. Tennessee Gas Transmission Co.*, 371 U. S. 154.

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6. In this connection it is significant to note that the evidence submitted both by the Commission's Staff and the Intervenors in the South Louisiana Area Rate proceeding, Docket AR61-2, indicates that the just and reasonable rate for sales comparable to those of respondents herein is well below the 20.0¢ per Mcf floor used by the Commission in the present case. Any difference of this kind will, of course, under the structure of the Act, be unrecoverable by consumers.

CONCLUSION.

For the reasons stated above this Court should issue its Writ of Certiorari to review the decision of the Fifth Circuit entered in *Callery Properties, Inc., et al. v. FPC* on August 14, 1964.

Respectfully submitted,

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Dated: November 10, 1964.

APPENDIX A.

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES.

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the

filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on

file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

* * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE.

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall

be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * *

REHEARING: COURT REVIEW OF ORDERS.

Sec. 19 . . .

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem

proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, sec. 1254).

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 20872.

CALLERY PROPERTIES, INC.,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20885.

THE SUPERIOR OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20890.

CAROLINE HUNT SANDS AND LOYD B. SANDS,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20891.

PLACID OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20892.

MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20967.

J. RAY McDERMOTT & CO., INC.,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20989.

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 21028.

J. R. FRANKEL, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

Petitions for Review of Orders of the Federal Power Commission.

(August 14, 1964.)

Before RIVES and BROWN, *Circuit Judges,* and GROOMS, *District Judge.*

BROWN, *Circuit Judge:* These cases present important questions under the Natural Gas Act, 15 USCA § 717. These include the nature of the hearing and the scope of the pertinent evidence bearing on price in a § 7 application for permanent certificate, the legality of retroactive rate refund, and the validity of a moratorium on post-certificate § 4 price increases.

The cases are not new for us, certainly not, as to one case. Their presence here bears out the prediction of the dissenter[1] that this case will be back several years and thousands of pages later."[2] Without assaying the balance

1. United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, 138, 147 (dissenting opinion).

2. The certificate of the records shows that some of these ran as high as 10,000 pages, others 5,000 and 6,000. Counsel, with the responsible concern demonstrated by Federal Power practitioners, public and private, have reduced it to 617 printed pages under our special FPC practice which became the forerunner of our amended Rules 23 and 24. See Hunt v. FPC, 5 Cir., 1962, 306 F. 2d 334, 336, n. 1. The 17 briefs exceed 480 additional pages.

of the dissenter's prophesy that "no one will know more than is known now," it is ironic that we hold that we do not know enough because the Commission declined to receive and evaluate important evidence. Thus, in their fifth year, these applications must now go back to have the kind of hearing which we, and other Courts of Appeals, directed.

I.

These are all fallout from Catco[3] in which the Supreme Court reversed the unconditioned certificate because the 21.4¢ price was "out of line."

Within a short time after affirmance by the Third Circuit on August 4, 1959, of the *Transco-Seaboard* case,[4] the FPC in 6 separate formal hearings involving a total of 69 producer applications issued unconditioned certificates for South Louisiana (and offshore) sales at initial contract prices ranging from 21.4¢ per Mcf where no tax reimbursement was due to 23.8¢ including tax reimbursement. But within 4 months, the Third Circuit's *Transco-Seaboard* decision was summarily reversed.[5] On appeals taken by various distributor-intervenors, the grant of the certificates was reversed by this Court and Courts of Appeals for the Third, Ninth, Tenth, and D. C. Circuits.[6]

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3. Atlantic Refining Company v. Public Service Commission of New York, 1959, 360 U. S. 378, 79 S. Ct. 1246, 3 L. Ed. 2d 1312.

4. United Gas Improvement Co. v. FPC, 3 Cir., 1959, 269 F. 2d 865.

5. Sub nom. Public Service Commission of New York v. FPC, December 14, 1959, 361 U. S. 195, 80 S. Ct. 292, 4 L. Ed. 2d 237.

6. The original Commission opinions, and the court reversals are as follows (present petitioners shown in parentheses):

(1) Transcontinental Gas Pipe Line Co., Op. 315, 1958, 20 FPC 264, aff'd sub nom. United Gas Improvement Co. v. FPC, 3 Cir., 1959, 269 F. 2d 865, reversed mem. sub nom. Public Service Comm'n of New York v. FPC, 1959, 361 U. S. 195, 80 S. Ct. 292, 4 L. Ed. 2d 237 (Placid in No. 20891, Hill in No. 20892, and Frankel in No. 21028).

(2) Texas Gas Transmission Corp., Op. 327, 1959, 22 FPC 378, reversed, Public Service Comm'n of New York v. FPC, D. C.

On May 10, 1961, the FPC consolidated the remanded proceedings with the Southern Louisiana area rate proceeding.[7] On January 10, 1963, the FPC denied motions of some intervenor-distributors for security on possible rate refunds. Expressing the view that it has "power to determine these proceedings on the basis of the respective records as originally made and in the light of additional facts of which we may take official notice" without further hearing, the Commission nevertheless determined to "adhere to the view that it would be fair and wiser in the present circumstances to offer the applicants a further opportunity to adduce evidence in docket numbers AR61-2 et al. In support of their proposed prices." But it ordered that rate collections "shall be subject to such refund provisions as

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Cir., 1960, 287 F. 2d 146, cert. denied, 1961, 365 U. S. 880, 882, 81 S. Ct. 1030, 1031, 6 L. Ed. 2d 192 (Callery in No. 20872, Sands in No. 20890, McDermott in No. 20967, and Ocean Drilling in No. 20989).

(3) California Co., 1959, 22 FPC 252, reversed, United Gas Improvement Co. v. FPC, 9 Cir., 1960, 283 F. 2d 817, cert. denied, 1961, 365 U. S. 879, 881, 81 S. Ct. 1030, 6 L. Ed. 2d 191, 192 (Superior in No. 20885).

(4) Sun Oil Co., 1959, 22 FPC 351, reversed, United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, cert. denied, 1961, 368 U. S. 823, 82 S. Ct. 41, 7 L. Ed. 2d 27.

(5) Sunray Mid-Continent Oil Co., 1959, 22 FPC 361, reversed, United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F. 2d 159.

(6) Superior Oil Co., 1959, 22 FPC 369, reversed, United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 147, cert. denied, 1961, 366 U. S. 965, 81 S. Ct. 1926, 6 L. Ed. 2d 1255 (Superior in No. 20885).

7. Docket No. AR61-2, 26 Fed. Reg. 4296 (1961).

The area pricing was initiated by Statement of General Policy No. 61-1, issued September 28, 1960. 24 FPC 818 (1960); 18 C. F. R. § 2.56 (1961). By the First Amendment to Statement of General Policy No. 61-1, issued October 25, 1960, the FPC fixed an area price level of 21.5¢ per Mcf plus tax reimbursement. 25 Fed. Reg. 10,488 (1960). Subsequently, by the Fourth Amendment to Statement of General Policy No. 61-1, issued October 23, 1961, the FPC reduced the area price level for initial sales of gas from South Louisiana to 21.25¢ per Mcf, inclusive of tax reimbursement. 26 Fed. Reg. 10,342 (1961).

the Commission may lawfully prescribe by its final order * * * to the extent, if any, that the rate which has been collected exceeds the rate ultimately found to accord with the requirements of the public convenience and necessity."[8] In overruling the petitions for rehearing, the FPC on March 7, 1962, severed the proceedings from AR61-2 and then "consolidated [them] for the limited purpose of determining the public interest, initial price, or prices, applicable to these proceedings."[9] In this order of March 7, 1962, the FPC noted that six weeks earlier, in the remanded Catco dockets, it had found the in-line level in south Louisiana to be 18.5¢ per Mcf, plus 1.5¢ tax reimbursement where applicable. Rejecting contentions by intervenor-distributors that a like finding should peremptorily be entered in these proceedings, the Commission nonetheless concluded that it "should afford the producers further opportunity to be heard."

The hearings thus scheduled were held before an Examiner June 18-21, 1962. At the outset of the hearing, the producers sought to introduce what the Examiner described as "a tremendous mass of cost-type, economic and financial evidence." This cost-of-service evidence followed generally the pattern used by the Commission in prior determinations. Broadly speaking it demonstrated that on a cost-of-service basis the cost to the producers was considerably in excess of the contract price sought to be certificated in the pending applications. Other evidence bore upon the minimum financial requirements for finding and producing gas. These also used techniques and methods employed by the Commission in determining analogous minimum financial requirements. Other evidence showed the demand and sup-

8. Superior (our Case No. 20885—see Items (3), (6), note 6, supra, was not a party to this order.

9. Petitions to review the refund-warning order of January 10, 1962, were dismissed by us "without prejudice to the rights of petitioner to attack the validity of the orders * * * in petitions to review, * * * the orders of July 17, 1963, in the Commission's Opinion No. 398."

ply situation existing both nationwide and in South Louisiana. Some was detailed, indicating that the demand for gas is increasing far in excess of the annual additions of gas supply. Other evidence tied this directly into the exploration for, and finding of, new gas supplies to meet the increased demands, the relation of field prices to those efforts, the impact of lowered prices on exploratory activity, and the like. Other evidence showed the nationwide increase in the current cost of new gas supply over the pre-Catco prices, the increase in the weighted average contract price in this period in relation to drilling and exploratory costs, and refutation of the assertion that contract prices in South Louisiana have leaped from plateau to plateau. We need not describe it in any greater detail since in affirming the Examiner's rejection of the evidence, the Commission characterized it as "economic and financial evidence" including that relating to "an individual company or on an area-wide basis" without regard to whether it was "the type characterized as cost-of-service studies, cash flow studies, demand-supply, cost, profit and market price trends, area cost-revenue trends, comparative well cost data and gas replacement costs * * *."

On the motion of the intervenor-distributor supported by Commission staff, the Examiner rejected all of this evidence. In his decision of December 7, 1962, he (1) concluded that the in-line price for the pending sales was 18.5¢ per Mcf plus 1.5¢ per Mcf tax reimbursement where applicable, (2) directed that the producers refund, with interest, all amounts previously collected in excess of the in-line levels of 18.5¢ and 20.0¢.[10] Accepting in the main all of the Examiner's findings and conclusions, the FPC by opinion 398, issued July 17, 1963, took these actions. It unanimously sustained the exclusion of producer cost data, and the finding that the in-line price was 18.5¢. By a 4-1 vote it approved the

10. The Examiner rejected a number of contentions of Staff and intervenor distributors, one of the Staff being that "excess" payments made to the producers under "take-or-pay" provisions for gas not delivered should be refunded.

refunds.[11] In addition, the Commission—on the basis of a finding that rate filings to levels in excess of 23.55¢ per Mcf would cause widespread triggering throughout Southern Louisiana—imposed a moratorium on filings in excess of 23.55¢ until July 1, 1967, or until the conclusion of the pending Southern Louisiana AR61-2 proceeding, whichever is earlier.[12]

Petitions for review have been filed by the producers (see note 6, *supra*). The questions presented for our decision are these. (1) Did the Commission err in excluding the proffered cost and economic data evidence? (2) Did the Commission err in imposing a moratorium on price increases in a permanent certificate? (3) Did the Commission err in ordering refunds of the amounts previously collected? (4) Did the Commission err in fixing the in-line price at the 18.5¢ level? (5) Did the Commission err as to take-or-pay refund provisions? (6) Did the Commission err in making the refund order applicable to Frankel and Placid's Docket No. 13184?

II.

Exclusion of Cost Evidence.

We think that a proper consideration of the Act and its elucidation in Catco demonstrates that the Commission erred in rejecting the proffered evidence on cost and other economic data. No doubt Catco is significant and binding, and we accept it without any effort to whittle it down. But

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11. Refunds by Superior for collections under one temporary certificate prior to August 10, 1959, were excused based on the FPC's decision Skelly Oil Co. Op. 362, 1962, 28 FPC 401, subsequently reversed in Public Service Commission of New York v. FPC, D. C. Cir., 1964, 329 F. 2d 242.

12. The FPC rejected Staff's contentions of refund of take-or-pay prepayments, but it conditioned the certificates upon the ultimate outcome of a pending rule-making proceeding, R-199, review of which was recently held to be premature by the D. C. Cir., 1964, 329 F. 2d 242, 248.

the simple fact remains that it is a statute which we are expounding, and the statute does not refer to, much less speak of "in-line" price. To be sure, whether a proposed price is in-line or not is an important, sometime decisive, factor. But it is a factor to be weighed along with others in determining whether the proposed sale of gas in interstate commerce "is or will be required by the present or future public convenience and necessity." [13]

In the Commission Catco proceeding the Commission, presumably reasoning that a post-certification § 5 rate hearing would afford ample protection against improvident prices, declined altogether to consider the reasonableness of the proposed price or its relation to public convenience and necessity. This approach seemed to find some basis in the structure of the Act in which the statutory provisions concerning rates were found in §§ 4 [14] and

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13. Section 7(e), 52 Stat. 824, as amended, 56 Stat. 84, 15 USCA § 717f(e) provides:

"* * * [a] certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operation, sale, service * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of * * * the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

14. 15 USCA § 717c.

"4(a) All rates and charges made, demanded, or received by any natural-gas company for * * * the transportation or sale of natural gas * * * shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"* * *

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission * * * schedules showing all rates and charges for any transportation

5[15] and not in § 7 which dealt with the initial application for certification, temporary or permanent. This argument acquired some operational support from the magnitude of the administrative problems, both in time and manageability, of turning every § 7 application into a full blown rate hearing to determine whether the proposed rate was "just and reasonable."

The Supreme Court in Catco forcibly rejected this approach of the Commission. The Court made clear that price was indeed important. It recognized, of course, that "the Act does not require a determination of just and reasonable rates in a § 7 proceeding * * *" or "that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates." And the Court pointed out that it was the delay in processing § 5 proceedings that "requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7." But the Court immediately tied price to public convenience and necessity

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or sale * * * together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

"(d) Unless the Commission otherwise orders, no change shall be made * * * in any such rate * * * except after 30 days' notice to the Commission and to the public * * *.

"(e) Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or esrvice; and, pending such hearing * * * may suspend the operation of such schedule * * * but not for a longer period than five months. * * * Where increased rates or charges are thus made effective, the Commission may * * * require the natural-gas company to furnish a bond * * * to refund, with interest, the portion of such increased rates or charges * * * found not justified. * * *."

15. 15 USCA § 717d.

"5(a) Whenever the Commission, after a hearing * * * shall find that any rate, charge * * * collected by any natural-gas company * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge * * * practice or contract to be thereafter observed and enforced and shall fix the same by order: * * * ; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

by requiring that the price "proposal must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued." The recent increase in the price levels, the Court went on, "does make price a consideration of prime importance" and "where the application on * * * presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued." After stressing "public convenience and necessity" not less than six times in the space of two paragraphs, 360 U. S. 378, at 390-91, the Supreme Court for the first time articulates the "in-line" concept. "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U. S. 378, at 391.

The Court stressed that by certificate conditions under § 7, "the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate." 360 U. S. 378, at 392. Of unusual importance here was the Court's statement in the analysis of the deficiencies of that record in which "no effort was made to give the 'reason why' * * * the proposed price was some 70% higher than the weighted average cost of 'existing gas to the purchaser.' "

As though Catco began and ended with "in-line" the Commission and the intervenor-distributors are mesmerized by this catch phrase into supposing that the Commission's responsibility is discharged with that limited inquiry and if unsatisfied on that score, it is free to reject out of hand a producer's application for a new service. Catco did

not so hold, and this approach ignores the plain terms of the statute which are no way diminished by Catco. Vast as is the discretion of the Commission, the statute, § 7(e), footnote 13, *supra*, accords positive rights to natural gas producers desiring to sell gas in interstate commerce. A producer does not, of course, have an absolute right to engage in the sale. It does, however, subject to compliance with reasonable procedural rules and requirements of the Commission [16] have an absolute right to a consideration of the application by the Commission and the right to have it granted "if it is found that the applicant is able and willing properly to do the acts and to perform the service * * * and the * * * sale * * * is or will be required by the * * * public convenience and necessity." The Commission does not, therefore, fulfill its statutory duty by the limited inquiry into whether the price is "in-line." Conversely, it has no power to deny the application solely on the ground that the price is not "in-line." To be sure, if the proposed price is not "in-line," this may become the dominant factor in denying the application. But it must be done as a part of the larger element of "public convenience and necessity." The Court makes this clear in *FPC v. Transcontinental Gas Pipe Line Corp.*, 1960, 365 U. S. 1, 8, 17, 22, 81 S. Ct. 435, 5 L. Ed. 2d 377: "In fact in interpreting this very section we said that 'Sec. 7(e) requires the Commission to evaluate all factors bearing on the public interest' * * *." Later, the Court states, "In this connection, it must be realized that the Commission's powers under Section 7 are, by definition limited. * * * The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of all the circumstances weighs against certification." [17]

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16. FPC v. Texaco, Inc., 1964, — U. S. —, — S. Ct. —, 12 L. Ed. 2d 112.

17. Rejecting the Respondent's claim that the Commission had used its power to prevent a levering upward of field prices to bar direct sales of gas, it said: "Certainly such action would be contrary

In the concept of public convenience and necessity, price is, of course, very important. But it is not the whole thing. And certainly under a statutory scheme for a utility-type of regulation for the sale, not of a service, but of a depletable commodity,[18] where the Commission serves primarily as a rate-reviewing, not a rate-fixing agency,[19] and in which the entry into the regulated market is the voluntary act of the gas producer,[20] it is perfectly evident that many factors other than price alone bear upon public convenience and necessity and, in turn, upon price.

One of the most critical factors is, of course, the extent and nature of the demand. We decline to believe that the FPC can be oblivious to what all others know firsthand of occurrences since 1956-57, the era that begat the so-called Catco "in line" price. Population is increasing at explosive rates particularly in metropolitan areas in the South, Southwest and West Coast. What are, for example, the insatiable energy requirements of this ever-expanding population and industrial complex? If the demand is present,

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to our previous statements that the term 'public convenience and necessity, connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination. United States v. Detroit & Cleveland Navigation Co., supra.[19] * * * as the Commission stated, 'countervailing factors suffice to tip the balance against the grant of the authority requested by Transco.'"

Footnote 19 reads: "19. Compare the cases which have held that it was error for the Commission to refuse to consider certain factors within its power of notice. E.g., City of Pittsburg v. Federal Power Commission, 99 U. S. App. D. C. 113, 237 F. 2d 741."

18. Chief Judge Tuttle has pointed out: "This is concededly a difficult standard to specify especially in light of the fact that producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." Gulf Oil Corp. v. FPC, 5 Cir., 1958, 255 F. 2d 556, 557.

19. United Gas Pipeline Co. v. Mobile Gas Service Corp., 1956, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373.

20. FPC v. Hunt, 1964, — U. S. —, — S. Ct. —, 11 L. Ed. 2d 878, 883.

the next decisive question is, what about the supply? Can it reasonably be met by the gas now under dedication? Where and from what sources can the demand reasonably be satisfied? And whether this does, or does not, bring about price increases, the decisive question then becomes what price will it take to get the needed gas? The latter question, of course, sets in train a whole series of subsidiary inquiries. This is so because even under a system of voluntary initial dedication of gas, the acceptable price may not be measured by the intransigent demand of a producer. Inherent reasonableness in terms, say, of the likelihood that the needed supply of gas will be obtainable from others by exploration and new production and other similar questions would remain. Other factors could be named.[21] The important thing is that price is not the sole criteria.

A price-only approach does more than substitute for the statutory standard of "public convenience and necessity" a rigid, mechanical arithmetical guide. It is conceivable that such a test could imperil the public interest by foreclosing needed gas from the interstate market solely because the price is out of line. The so-called "in line" concept necessarily involves a question of time—here in the neighborhood of 1956-57 prior to the contaminating influence of the initial Catco contract. It involves also a selection of so-called comparables and a rejection of those which are either "too high," or are thought to be so, or are otherwise "suspect."[22] Essential as it is that the Commission scrutinize carefully apparent price increases, it is inconceivable

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21. Several factors were mentioned just this term in FPC v. Hunt, 1964, — U. S. —, — S. Ct. —, 11 L. Ed. 2d 878. The Court there concluded that the purpose as revealed by the legislative history was to give the FPC "an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure."

22. See Morris, Recent Independent Producer Certificate Cases: The "Suspect Order" Rule, 32 Geo. Wash. Law Rev. 489 (1964); Amerada Petroleum Corp., Op. No. 422, 1964, — FPC — [Nos. C162-1544, March 23, 1964].

that Congress meant to freeze the rates to 1956-1958,[23] or to any other particular time for that matter.[24]

Rather, the public interest is protected by requiring the Commission to consider price in terms of the whole public convenience and necessity. Indeed, this was recognized by the Ninth Circuit in one of the very cases precipitating the remands now under review.[25] That Court rejected as being "without merit" the "contention that the price line must necessarily accord with the pre-Catco line." The Court went on, "we agree with the view expressed by the Commission in Texas Gas Transmission Corp. et al., 22 FPC 378, 388, that factors such as increased production costs since CATCO, comparative accessibility of field locations and comparative depth of sands tend to make pre-CATCO prices irrelevant for comparative purposes in other cases." *United Gas Improvement Co. v. FPC*, 9 Cir., 1960, 283 F. 2d 817, 823. Earlier that Court stated that "* * * the Commission properly refers to circumstances under which an unconditional and permanent certificate might be issued notwithstanding the fact that the proposed price is out of line." 283 F. 2d 817, 821.

And this same theme was echoed by each of the other remanding Courts. "It is conceivable" said the Tenth

23. The 18.5¢ per Mcf price fixed here was the figure previously determined to be appropriate in the remanded Catco case, 1962, 27 FPC 96. This line was actually a 1956 level.

The Commission forecasts that the area proceedings will result in just and reasonable rates. But it recognizes that "[to hold the line] does not mean that irrespective of evidence to the contrary an absolute price freeze is to be imposed until some future date when area proceedings ultimately establish 'just and reasonable' rates."

In re Amerada Petroleum Corp., Op. 422, 1964, — FPC —, — [Docket No. C162-1544, March 23, 1964].

24. Indeed, the very nature of present and future public convenience and necessity forbids a look-back to 1956-57 only. The inquiry must include the time of the award. FCC v. Pottsville Broadcasting Co., 1940, 309 U. S. 134, 145, 60 S. Ct. 437, 84 L. Ed. 656; Easton Publishing Co. v. FCC, D. C. Cir., 1950, 185 F. 2d 987, 991.

25. See (3), note 6, supra.

Circuit, "that in some circumstances public convenience and necessity may require certificating of a sale when the price is 'out of line.'"[26] The D. C. Circuit pointed out alternative courses for the Commission where the "prices * * * are suspiciously higher." One course was to impose interim conditions. As to the other, it offered this solution. "On the other hand, it [the Commission] may grant unconditional certification upon evidence sufficient to 'support a finding of public convenience and necessity.'"[27] We spoke in terms of burden making "it * * * clearly incumbent on the proponent of [the proposed] rate to make some showing of the 'reason why' (as it was expressed in the Catco opinion) * * *," the proposed rate was a proper initial rate in view of rates half that high just a few years before.[28]

Evidence of the kind proffered by these petitioners bore upon these questions of public convenience and necessity. That the evidence would, in whole or in part, be pertinent to a § 4 or § 5 "just and reasonable" rate hearing is a matter of no decisive significance. If it proves too much, or proves too little, this is a matter calling for the expert evaluation and judgment of the Commission.[29] We

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26. United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F. 2d 159, 163.

27. Public Service Commission v. Federal Power Commission, D. C. Cir., 1960, 287 F. 2d 146, 149. The Court then remanded as follows: "The order, insofar as it grants unconditional certification to the initial price proposals of the producer applicants, is reversed and the case is remanded to the Commission for further proceedings in which the producer applicants may, if they so choose, either augment the record so as to support a certification without price condition, or seek certification appropriately conditioned." 287 F. 2d 146, at 150.

28. United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, 138.

29. The argument that to receive evidence of this nature is to allow a producer a fair rate of return on excessive costs is a non sequitur. We agree with Judge Wright that "The Commission is not required to subsidize high cost producers with consumers' money." Atlantic Refining Co. v. FPC, D. C. Cir., 1963, 316 F. 2d 677, 680. But whether costs are "too high" or even "high" are comparative factual matters calling for evidence and evaluation.

have no fear that with resourceful ingenuity the Commission can develop procedural devices which will keep these § 7 hearings from being bogged down into the full dress § 4 or § 5 rate hearing. Its awesome task calls for great administrative inventiveness which will assure to all, producer, consumer, and public alike, the full measure of statutory rights. *Hill v. FPC*, 5 Cir., 1964, — F. 2d —, —, n. 27 [Nos. 20375, 20386, July 23, 1964].[30]

The task facing the Commission in this developing field calls for innovation and adaptation. It is not, therefore, enough merely to inquire whether the price is "in-line." On the other hand, for § 7 purposes, there need not be a full dress § 4 or § 5 rate hearing. The Commission must, however, hear and evaluate all relevant evidence bearing on

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30. Following the Supreme Court's lead in its admonition that the Commission must find ways to expedite proceedings, we there pointed out that much delay flows from an overuse of motions to dismiss instead of an evaluation of evidence for its intrinsic worth in the light of the Commission's expertise. The instant cases graphically illustrate that a motion to strike evidence relating to complex activities is an equally awkward procedural device of limited utility. For all we know, had the Commission received the proffered evidence, it would have held it to be wanting, and that might well have been the end of the matter. Now the case must go back and proceed through lengthy hearings, rehearings, exceptions, arguments before the Commission, rehearings and reargument to receive and evaluate this very evidence. In terms of time and the public interest, the apparent time-saving device of striking this evidence as irrelevant has proved again that the shortest way through is often the longest way around. Determining the utter and irretrievable irrelevance of a large body of evidence under the nuances of a concept as elusive as public convenience and necessity is indeed a summary procedure. And we have many times pointed out that summary procedures "present a treacherous record for deciding issues of far-flung import, on which * * * [Courts] should draw inferences with caution from complicated courses of legislation * * * and practice." Kennedy v. Silas Mason Co., 1948, 334 U. S. 249, 257, 68 S. Ct. 1031, 92 L. Ed. 1347; Chapman v. Hawthorne Flying Service, 5 Cir., 1961, 287 F. 2d 539, 541.

public convenience and necessity when it is urged, or held,[31] that the proposed price is out of line.[32]

III.
Price Moratorium.

So far as rates are concerned, the Commission did two principal things. First it conditioned the permanent certificate on a reduction of the initial rate to 18.5¢ per Mcf. Second, it found that there was a triggering[33] at 23.55¢, and in order to prevent retriggering, it prohibited the producers from exercising their contract rights to file rate increases above 23.55¢ until the conclusion of AR61-2 or July 1, 1967, whichever is earlier. That moratorium does permit, however, increases from 18.5¢ up to 23.55¢.[34]

Although the Supreme Court stated that the "extent of [the] power [to condition price changes] in permanent certification is not before us now," we think the full import of its recent decision, reversing this Court, *Federal Power Commission v. Hunt*, 1964, — U. S. —, 84 S. Ct. —, 11 L. Ed. 2d 858, 886, compels a holding that the Natural Gas

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31. Nothing will keep the Commission from doing this by a two-step proceeding. See Hill v. FPC, supra. Indeed, this Court has recently approved separate trial by separate juries of validity-infringement on the one hand and damages on the other in patent cases. Swofford v. B. & W., Inc., 5 Cir., 1964, — F. 2d — [No. 21024, July 28, 1964].

32. The evidence relating to cash outflow and replacement cost proffered and rejected in Public Service Commission of New York v. FPC, D. C. Cir., 1964, 329 F. 2d 242, was much more limited than that here. Nor do we regard California Oil Co. v. FPC, 10 Cir., 1963, 315 F. 2d 652 (inquiry as to what the line was); Atlantic Refining Co. v. FPC, D. C. Cir., 1963, 316 F. 2d 677 (question of in-lineness stipulated to be sole issue), as holding contrary to our decision.

33. Some of the proffered but rejected evidence, see Part II, supra, actually touched on the factual basis, or lack thereof, of the Catco assumption that "new price plateaus will * * * be created." 360 U. S. 378, at 390. We assume, however, that there was a factual basis for the Commission's finding.

34. The moratorium has a present impact. See, e.g., Superior's contract with United permitting escalation to 23.5¢ plus 2.3¢ tax reimbursement.

Act forbids a moratorium on price increases as a condition to the issuance of a permanent certificate.

Of course the statute gives the Commission the power to attach "such reasonable terms and conditions" to the issuance of the certificate "as the public convenience and necessity may require." See footnote 13, *supra*. Literally, no distinction is made between temporary and permanent certificates. And undoubtedly there are a number of conditions which lawfully may be attached to the issuance of a permanent certificate.[35] But as the Court did there, when we examine the interplay between § 7 on certification and §§ 4 and 5 on "just and reasonable" rates and rate changes, we think that Congress did not intend that the Commission have the power by a certificate condition to supersede the working of § 4. By § 4 Congress established a statutory scheme in which rates are prescribed and become effective by contractual provision. *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 1956, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373; *United Gas Pipeline Co. v. Memphis Light, Gas & Water Division*, 1958, 358 U. S. 103, 79 S. Ct. 194, 3 L. Ed. 2d 153.

There is no real question about the operative process or effect of § 4(e). Subject only to suspension for a limited brief period of time and the obligation to refund on final determination, the rates prescribed in the contract become effective when filed. The only real problem is the point at which the rights of a producer and the powers of the Commission under § 4 become applicable. This the Court answers squarely in *Hunt*. "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of § 4 become applicable." — U. S. —, — S. Ct. —, 11 L. Ed. 2d 878, at 884. It is at that point that "the gas has been permanently certificated into interstate commerce * * *" and, the Court continues, at that point "the independent producer is then free to pursue the rate filing procedure of that section."

35. — U. S. —, — S. Ct. —, 11 L. Ed. 2d 878, 885, n. 3.

Other parts of the opinion make clear that the critical distinction is between the temporary, conditional certificate, on the one hand, and a permanent certificate on the other. Thus the Court points out, "once a permanent certificate is granted, the Commission can correct an improper rate only under § 5 of the Act * * *," — U. S. —, 11 L. Ed. 2d 878, 883. In view of the necessity for some character of certificate before the gas "can move into interstate commerce" and the statutory right to apply "for temporary authorization" the Court recognizes that "* * * the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties." But, the Court goes on, this "* * * condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate." — U. S. —, 11 L. Ed. 2d 878, 884. And some of the more sweeping statements made in Catco [36] where reference was made to conditional certificates without indication as to permanent or temporary must now be read as conditional *temporary* certificates. For the Court, immediately preceding an extensive quotation from Catco, put its own characterization on the nature of the certificates being dealt with in Catco when it said, "this Court previously discussed the use of the *temporary* certificate procedure in" Catco. (Emphasis supplied.) — U. S. —, 11 L. Ed. 2d 878, 884.

The correctness of our holding is demonstrated by the peculiar facts of this record. For applications filed in 1958,[37] the Commission asserts the power to compel the producer to sell gas for nearly ten years [38] at a price sub-

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36. 360 U. S. 378, 79 S. Ct. 1246, 3 L. Ed. 2d 1312.

37. The Placid and McDermott applications, filed September and December 1958, are typical. There were some as early as April 1957.

38. The moratorium runs until July 1, 1967, or until any earlier final decision in AR61-2. AR61-2 is still going strong. Its earlier counterpart, the Permian Basin hearing, AR61-1, is pending for decision before the Examiner. The briefs inform us that Chairman Swidler has stated that it will be March of 1965 before 61-1 is decided by the Examiner and the end of 1965 before 61-2 is forthcoming. Oil

stantially less than the opening contract price and without the opportunity of being able to ever seek and obtain the automatic stepped up price increases provided for in the contract. Thus, for nearly half of the twenty-year contract period [39] through the guise of a "price" condition, the Commission obtains an irrevocable dedication [40] of the gas to interstate sale and an effectual denial of any opportunity for the producer to exercise the legislative right to file, subject to suspension and refund, contractual rate increases. If the Commission may do it for half of the period, there is no reason why it may not do so for all. Congress could hardly have intended to delegate the power of legislative repeal by any such easy route.

Actually, the Commission's argument for moratorium power harkens back to the like contention made to support exclusion of pertinent economic data discussed in Part II above. Here, as there, it insists that it must have the power to impose a price moratorium because the alternative is either to force a full blown § 4 or § 5 "just and reasonable" rate hearing, which is an unmanageable administrative problem, or exclude the needed gas from the market until such time as such a hearing can be conducted. But as there, we fail to see that it is a case of either or. If the kind of hearing which the particular facts of a particular application require [41] for determination of "public

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& Gas Journal 62 (March 16, 1964). A minimum of two years more will be required before they grind through Commission review to land in some Court of Appeals for judicial review. See Wisconsin v. FPC, 1963, 373 U. S. 294, 83 S. Ct. 1266, 10 L. Ed. 2d 357; FPC v. Texaco, 1964, — U. S. —, 84 S. Ct. —, 12 L. Ed. 2d 112, 119, n. 13.

39. Superior's contract with United covering Bayou Penchant and other leases in Terrebonne Parish and the November 1, 1957, contract between Hassie Hunt Trust and Transco appear to be typical.

40. Since all petitioners have made sales, none is free to withdraw its reserves from dedication. J. M. Huber Corp. v. FPC, 3 Cir., 1956, 236 F. 2d 550.

41. There are no hard and fast rules. Adaptation is the order of the day in this undulating field. See Hill v. FPC, 5 Cir., 1964, — F. 2d — [Nos. 20375, 20386, July 23, 1964].

convenience and necessity," it is to be assumed that the Commission will issue a permanent certificate only if the initial contract price is in line or, if out of line, meets the statutory standard of public convenience and necessity. Full protection to the consumer is thereafter accorded so far as subsequent contract rate increases are concerned under the suspension and refund procedures of § 4(e). If, in that situation, there might be some further triggering impact, then that would flow from the unique statutory scheme which Congress, not the Commission nor the Courts, are free to change no matter how unsound some might think it to be.

The Commission's brief recognizes that it "is true that in *CATCO, Texaco, Inc. v. FPC* * * *, *Atlantic Refining Co. v. FPC* and *California Oil Co. v. FPC* cited by [certain of the petitioners] the Courts assumed that any rate increases contractually permitted could be filed under Section 4 at any time after operations were commenced under a certificate."[42] But it treats these as judicial aberrations resulting presumably from a failure on the part of the Commission "to meet its hold-the-line obligation by a moratorium condition." This leads the Commission's counsel to claim the necessity for, and the existence of, a power to take whatever action, impose whatever conditions to assure that "excessively high prices are absolutely prevented from being charged." But no matter how commendable that policy may be, the Commission may not supersede § 4 to accomplish it.

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42. Commission Br. 39. The cases referred to are: Catco, 360 U. S. 378; Texaco, Inc. v. FPC, 5 Cir., 1961, 290 F. 2d 149, 156; Atlantic Refining Co. v. FPC, D. C. Cir., 1963, 316 F. 2d 677; California Oil Co. v. FPC, 10 Cir., 1963, 315 F. 2d 652, 660; see also Willmut Gas & Oil Co. v. FPC, D. C. Cir., 1961, 294 F. 2d 245.

IV.
Retroactive Refunds.

After fixing the initial price at 18.5¢ per Mcf, the Commission in its conditions also required that the producers refund, with interest, the excess over that figure which had been collected under the judicially reversed unconditioned certificates.

The producers make three principal attacks on this refund order. The first one—that the intervenor-distributors should have sought to stay gas deliveries pending determination in the respective Courts of Appeals [43] of their petitions for review—has little merit. Quite apart from any problem of whether intervenor-distributors could have met applicable standards for a stay,[44] the producers' plight was not brought about by the failure of the petitioning intervenors to obtain a stay, but came from the action of the producers in making the deliveries under certificates which, though final, were then under direct judicial attack and subject as any competent Power Commission counsel would know, to the possibility of judicial reversal. The risk inherent in making deliveries pending final judicial determination was obvious to the producers. It was up to them to seek interim protective relief from the Commission, and there is no indication that extensions of time or other appropriate relief would have been declined by the Commission.

In the second attack some petitioners [45] apparently contend that the Commission could not order refunds be-

43. See note 6, supra.

44. The intervenors stress, for example, Virginia Petroleum Jobbers Association v. FPC, D. C. Cir., 1958, 259 F. 2d 921; Eastern Airlines, Inc. v. CAB, 2 Cir., 1958, 261 F. 2d 830; Airport Commission of Forsyth County v. CAB, 4 Cir., 1961, 296 F. 2d 95, 96; Associated Securities Corp. v. SEC, 10 Cir., 1960, 283 F. 2d 773, 774-75; and Armour & Co. v. Freeman, D. C. Cir., 1962, 304 F. 2d 404, 406-08, 418.

45. See, e.g., No. 20989 (Ocean Drilling), No. 20872 (Callery), and No. 20891 (Placid).

cause the original unconditioned certificates were not "vacated" or "set aside" by the Courts. Other petitioners urge the opposite—no refund right because certificates were "vacated." The wording of the remand orders vary, those of the Ninth Circuit,[46] Tenth Circuit,[47] and this Circuit[48] spoke in terms of "vacating" or "setting aside," whereas those in the D. C. Circuit[49] and the Third Circuit, following the Supreme Court's mandate,[50] spoke in terms of being remanded for further proceedings. But we agree with the Commission that by the choice of one rather than the other terminology, the remanding Courts intended no distinctive difference in effect.[51]

The third, and serious, attack made by all is that the operative effect of the refund is that of a reparation order.[52] Under the structure of the Act, it has long been recognized, and never questioned, that "* * * under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.' " *FPC v. Hope Natural Gas Co.*, 1944, 320 U. S. 591, 618, 64 S. Ct. 281, 88 L. Ed. 333.[53]

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46. 283 F. 2d 817, at 826.

47. 287 F. 2d 159, at 163.

48. 290 F. 2d 133, at 138; 290 F. 2d 147, at 149.

49. 287 F. 2d 146, at 150.

50. 361 U. S. 195.

51. For reasons elucidated in Part II, we reject, however, the further contention of the Commission (Commission Br. 45-47) that "price" was the only issue on the remand.

52. As we indicated earlier (note 8, supra), Superior was not a party to the refund warning order of January 10, 1962. In our view, the order has no significance one way or the other.

53. Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 1951, 341 U. S. 246, 71 S. Ct. 692, 95 L. Ed. 912; Panhandle Eastern PipeLine Co. v. FPC, 3 Cir., 1956, 236 F. 2d 289, 292. The Supreme Court in T. I. M. E. v. United States, 1959, 359 U. S. 464, 469-70, 79 S. Ct. 904, 3 L. Ed. 2d 952, has recently said of *Montana-Dakota:* "It was held that the Federal Power Act, which like the Motor Carrier Act expressly declares unreasonable rates to be "un-

Although, as we point out shortly, these principles call for a special adaptation in the refund order, we think that the petitioners ignore the unusual circumstances of this case. By the remand orders (note 6, *supra*), all of the Courts of Appeals held that the unconditioned permanent certificates were improperly issued. It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a Court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal, order. Thus, under the unique circumstances of this case, refunds are proper.[54]

We have here an unusual situation. On the one hand we hold that producers cannot carry the general principle forbidding reparational orders to the point where it permits them to retain, without question, what was obtained under invalid orders. That means that refunds of excess collections are required. But there is no reason why the producers should, in point of time, be required to refund the difference between the amount collected and the conditioned price as soon as it is determined. Refund at that point is not required to serve any public purpose, or reimburse consumers for excess charges. It may, however, impose irreparable loss to the producers. One public interest is, of course, against triggering. But in these five to six years any triggering effect has already taken place, and its impact has been felt. This clock cannot be turned back. As to consumers, they are ultimately entitled to a

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lawful', does not create a cause of action for the recovery of allegedly unreasonable past rates * * *."

54. In so holding we do not accept the Commission's argument that it has some general powers to protect public rights similar to that of the NLRB in reinstatement and back pay awards in unfair labor practice cases. The propriety of the refund here stands on the peculiar circumstances of this case.

refund only to the extent that payments made here exceeded a "just and reasonable" rate.

The problem then is to accommodate what we regard to be the inherent power of the Commission to prevent detriment to the consumers to the needs of this case. To balance the two it means that the refunds for collections made during this long period can be determined only after the "just and reasonable" rate is fixed by an appropriate § 4 or § 5 proceeding.

Indeed, it is the operative impact of the policy against reparations, see note 53, *supra,* which makes this necessary. If the present refund order is affirmed, the producers must repay the difference between the conditioned price and the amount collected. In a § 4 or 5 rate hearing, it may well, however, turn out the "just and reasonable" rate is determined to be higher than the conditioned price.[55] But if the refunds have been made, that would be an empty ruling since there would be neither a legal right nor a practicable means for the producers to recapture that portion of the excessive refunds. *Atlantic Seaboard Corp. v. FPC,* 4 Cir., 1953, 201 F. 2d 568, 572; *Sohio Petroleum Co. v. FPC,* 10 Cir., 1961, 298 F. 2d 465, 467. The result, of course, would be that the consumers during the interim would have had gas at a rate less than "just and reasonable." No consumer is entitled under the statute to that. Nothing in the law should encourage that result or its possibility. And for it to occur means more than an undeserved windfall for favored customers. It means that other rate-payers are absorbing this deficiency and are therefore paying more than they should.

Such an approach is all the more required in view of the action which we take in remanding these cases for yet

55. We agree with the Commission and the intervenor-distributors that in the § 7 proceedings here ordered, the inquiry on public convenience and necessity is not synonymous with determination of "just and reasonable" rate to be fixed under § 4 or § 5. This forces the conclusion that the conditioned price may well be different from the rate ultimately fixed.

further hearings. Finding, as we do, significant procedural defects, we cannot sustain the conditioned price of 18.5¢. What that price will be, or whether there will be a price condition, must await the outcome of the further hearings. Refunds at the present time would be premature. At the same time this imposes no impossible administrative burden.[56] When and as the Commission on further hearings fixes the conditions, it can prescribe the necessary security to assure that the refunds, when ultimately fixed, will be paid and to or through the proper parties.

We agree that refunds can be required.[57] But to meet the exigencies of this unique case, they must be based, not on the conditioned price when fixed, but on the difference between the price collected and the rate found in a proper proceeding to be the "just and reasonable" one.[58]

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56. If, as the Commission contends, our ruling requires a § 7 hearing bordering on a § 4, 5 rate case, there is no reason why the Commission as to these particular cases does not consolidate with the remanded certification proceedings a § 4 or 5 rate case. Consolidation has been ordered before, see, e.g., Texas Eastern Gas & Transmission Co. v. FPC, 5 Cir., 1962, 306 F. 2d 345, 349, cert. denied, 1963, 375 U. S. 941, 84 S. Ct. 347, 11 L. Ed. 2d 273. Where these cases started out with 69 producer applicants, settlements have washed out all except these petitioners. As a precedent, our ruling is something less than the specter supposed, since the Commission, and many others including this Court, look with hope to the day when the area pricing procedure will supply most of the answers. Hunt v. FPC, 5 Cir., 1962, 306 F. 2d 334, 343; Hill v. FPC, 5 Cir., 1964, — F. 2d —, — [Nos. 20375, 20386, July 23, 1964]; Wisconsin v. FPC, 1963, 373 U. S. 294, 83 S. Ct. 1266, 10 L. Ed. 2d 357.

57. We think it inappropriate at this time to express any views as to interest or the rate, if interest is to be allowed.

58. As to Frankel's petition [No. 21028] and Placid's contention as to sales from its well No. 1, Raceland Field, we need only say that, subject to the principles we have discussed as to refunds generally, we agree with the Commission that it is appropriate to require that these producers make whatever refunds are ultimately found to be due for collections made during the time of their respective operations.

As to Superior's petition, except for the Commission allowing a grace period up to August 10, 1959, for sales under one temporary certificate, not here challenged, though similar action was disapproved in Public Service Co. of New York v. FPC, D. C. Cir., 1964, 329 F. 2d 242, 250, there appears to be no substantial difference between this record and the others.

V.

The "In-Line" Price Established.

The petitioners assert that in arriving at the in-line price of 18.5¢, the Commission improperly excluded many higher, finally certificated prices, failed to give proper weight to prices approved by the Commission's own settlements in similar cases, and failed generally to give proper evaluation to the evidence showing contract prices from which to infer the "in-line" price. This, and the petitioner's related contention, that the evidence demonstrated an in-line price not less than the contract price are matters on which we need not express any view. The remand for further hearing to receive all pertinent evidence, see Part II above, means that these aspects are likewise open for rehearing and redetermination.[59]

V.

Take-or-Pay Provisions.

In accordance with its earlier decision in Skelly, 1962, 28 FPC 401,[60] the Commission ordered that the take-or-pay provisions in the contracts should be subject prospectively to the Commission's future order in a pending rule-making proceeding, Docket No. R-199 with a provision that producers would not be required to file take-or-pay provisions for less than 80% of the annual contract quantities.

Superior alone contends that for gas not delivered there is no sale, and therefore take-or-pay provisions are beyond the jurisdiction of the Commission under the exclusionary language of § 1(b), 15 USCA § 717(b). When viewed realistically in the light of the imperative necessity for long term gas supply commitments, we agree with the

59. It should be clear that all we say about the "price" itself is equally applicable to the tax reimbursement element.

60. Public Serevice Corp. of New York v. FPC, D. C. Cir., 1964, 329 F. 2d 242.

Commission that this arrangement constitutes a sale within its power of regulation.

Under the peculiarities of this case with service having long ago been commenced and with no suggestion on the part of anyone that they wish to terminate it, we agree with the D. C. Circuit in its holding that this phase of the order does not presently present a reviewable matter. *Public Service Corp. of New York v. FPC,* D. C. Cir., 1964, 329 F. 2d 242, 248; see also *Humble Oil & Refining Co. v. FPC,* 5 Cir., 1956, 236 F. 2d 819, cert. denied, 1957, 352 U. S. 967, 77 S. Ct. 354, 1 L. Ed. 2d 321.

The causes are therefore reversed and remanded to the Commission for other and further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX C.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 20872

CALLERY PROPERTIES, INC.,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20885

THE SUPERIOR OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20890

CAROLINE HUNT SANDS AND LOYD B. SANDS,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20891

PLACID OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20892

MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20967

J. RAY McDERMOTT & COMPANY, INC.,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20989

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 21028

J. R. FRANKEL, ET AL.,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION.

Before RIVES and BROWN, *Circuit Judges,* and GROOMS, *District Judge.*

Judgment.

This cause came to be heard on the petitions of Callery Properties, Inc., The Superior Oil Company, Caroline Hunt Sands and Loyd B. Sands, Placid Oil Company, Margaret Hunt Hill, Trustee for Hassie Hunt Trust, J. Ray McDermott & Co., Inc., Ocean Drilling & Exploration Company, and J. R. Frankel, et al., for review of Orders of the Federal Power Commission issued on July 17, 1963 and September 11, 1963, in Docket Nos. G-13183, et al., and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Orders of the Federal Power Commission in these causes be and the same are hereby reversed; and that these causes be, and they are hereby remanded to the Commission for other and further proceedings consistent with the opinion of this Court.

August 14, 1964

Issued as Mandate: